STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CETRIC JACOLE GIBBS,

Defendant-Appellant.

UNPUBLISHED
April 19, 2005

No. 254401
Midland Circuit Court
LC No. 02-001312-FH

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of conspiracy to commit first-degree retail fraud, MCL 750.356c, first-degree retail fraud, MCL 750.356c, and driving with a suspended license, second offense, MCL 257.904(1). The trial court sentenced him to twenty-three months to five years in prison on his conspiracy and retail fraud convictions and one year in jail on his driving with a suspended license conviction. We affirm.

On April 22, 2002, defendant went to the Midland Mall with his girlfriend, his cousin, and his father. They entered the Elder Beerman department store, where defendant's father or cousin placed a large shopping bag in an inconspicuous place. Merchandise was concealed and placed into the bag while his cousin created a diversion in another part of the store by very obviously concealing items on his person. When the bag was full, his father retrieved it and left the store with defendant and his girlfriend. Defendant's cousin removed the obviously concealed items from his person and left the store separately. They all met at the vehicle, which they then moved to another mall entrance. While searching their vehicle, the police found a DVD box set from Suncoast and clothing from Elder Beerman, the Buckle, and American Eagle. Defendant and his companions did not have receipts for any of the merchandise, much of which had security tags attached and was still on hangers.

Defendant argues that the trial court erred in instructing the jury that the intent element of aiding and abetting could be satisfied merely by defendant's knowledge that the principal intended to commit the crime. Because defense counsel failed to object to the jury instruction as given, this issue has not been preserved for appellate review. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). We therefore review defendant's claim of error for plain error affecting substantial rights. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003). When reviewing jury instructions, we examine them "in their entirety to determine whether the trial court committed error requiring reversal." *People v Canales*, 243

Mich App 571, 574; 624 NW2d 439 (2000). Instructions must include "all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *Id.*

The trial court provided the jury with the standard instruction on aiding and abetting, CJI2d 8.1, "the Defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving the assistance." Anyone who intentionally assists another in committing a crime is as guilty as a person who directly commits the crime and can be convicted of those crimes as an aider and abettor. MCL 767.39; *People v Coomer,* 245 Mich App 206, 223; 627 NW2d 612 (2001). To prove aiding and abetting of a crime, a prosecutor must show: (1) that the crime charged was committed by defendant or some other person; (2) that defendant performed acts or gave encouragement that assisted in the commission of the crime; and (3) that defendant intended the commission of the crime *or* had knowledge of the other's intent at the time he gave the aid or encouragement. *People v Moore,* 470 Mich 56, 67-68; 679 NW2d 41 (2004) (emphasis added). Mere presence, even with the knowledge that an offense is about to be committed or is in the process of being committed, is not sufficient to establish that a defendant aided or assisted in the commission of the crime. *People v Norris,* 236 Mich App 411, 419-420; 600 NW2d 658 (1999).

Defendant contends that the jury instruction was improper because the intent requirement for aiding and abetting may not be satisfied by mere knowledge of the principal's intent. See *People v Kelly,* 423 Mich 261, 289-290; 378 NW2d 365 (1985) (Levin, J., dissenting). Although the *Kelly* Court found that this same jury instruction issue was unpreserved and declined to review it, Justice Levin opined that knowledge alone was not sufficient to support a finding of an intent to aid and abet. However, this Court has repeatedly held that an aider and abettor is not required to possess the specific intent required of the principal. *People v King,* 210 Mich App 425, 430-431; 534 NW2d 534 (1995). Like the *King* Court, we reaffirm this holding in the absence of a Supreme Court rule clarifying the intent required of aiders and abettors. *Id.* at 431.

Defendant made a statement to the police, in which he said that he would accept responsibility for the items stolen from Elder Beerman. He explained how they concealed the merchandise in a large shopping bag while his cousin created a diversion. His girlfriend confirmed their method of taking merchandise from Elder Beerman. She also admitted that the four of them had been stealing merchandise, that they were all aware of it, and that they had been to four different stores in the mall.

None of the employees in the four stores actually saw defendant or his companions leave the stores with any merchandise, and nobody identified any items that defendant stole. Defendant denied any awareness that his companions were stealing merchandise from Suncoast or American Eagle until after the fact. However, circumstantial evidence and reasonable inferences arising from it can constitute satisfactory proof of the elements of first-degree retail fraud. *People v Reddick,* 187 Mich App 547, 551; 468 NW2d 278 (1991); see also *People v Fennell,* 260 Mich App 261, 270; 677 NW2d 66 (2004).

Defendant admitted that he entered Suncoast, and the alarm went off when he and his companions left the store. A man matching defendant's description entered the Buckle with a man and a woman whose description matched his girlfriend. Their companion remained at the front counter and asked the employees "out of the ordinary" and "shifty" questions about

inexpensive necklaces and warranties while they looked at the sales racks and summer clothing. Defendant talked with an employee at American Eagle while his cousin and another companion shopped near where shirts and boxer shorts were displayed. The police found a DVD box set from Suncoast, shorts from the Buckle, and boxer shorts and shirts from American Eagle in the vehicle defendant was driving. A reasonable inference is that defendant and his companions used the same method of distraction and taking merchandise that they had admittedly used in Elder Beerman. The evidence presented at trial supported the jury instruction on aiding and abetting. Defendant performed acts that assisted in the commission of the crime, intended the commission of the crime, and/or had knowledge that his codefendants intended its commission at the time he gave his assistance. *Moore, supra* at 67-68.

Defendant argues that his dual convictions for retail fraud and conspiracy to commit retail fraud violate double jeopardy because there was insufficient evidence to support his retail fraud conviction. We review de novo a potential violation of the Double Jeopardy Clause. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). Challenges to the sufficiency of the evidence in criminal trials are reviewed de novo to determine whether, viewing the evidence in a light most favorable to the prosecutor, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002).

Both the United States and Michigan constitutions contain a Double Jeopardy Clause. US Const, Am V; Const 1963, art 1, § 15. Among other protections is a right "against multiple punishments for the same offense." *Nutt, supra* at 574. Conspiracy and the underlying substantive offense are "separate and distinct crimes," *People v Rodriguez*, 251 Mich App 10, 18; 650 NW2d 96 (2002), and dual convictions for conspiracy and the underlying substantive offense do not generally constitute a violation of double jeopardy, *People v Denio,* 454 Mich 691, 712; 564 NW2d 13 (1997).

To prove first-degree retail fraud, the prosecution must show that: (1) defendant took and moved property that a store offered for sale; (2) the store was open for business; (3) defendant had the intent to steal the property; and (4) the property was worth $1000 or more. MCL 750.356c(1)(b). Circumstantial evidence and reasonable inferences arising from it can constitute satisfactory proof of the elements of first-degree retail fraud. *Reddick, supra* at 551. Defendant admitted responsibility for the events at Elder Beerman, and his girlfriend confirmed his explanation of their method of taking the merchandise. Defendant admitted that he entered Suncoast, American Eagle, and the Buckle, and merchandise from all four stores was found in the vehicle he was driving. All the recovered merchandise was offered for sale at the four stores on April 22, 2002, while the stores were open for business. The total value of the stolen property from the four stores was over $1200.

Defendant's girlfriend told the police that all four of them had been stealing merchandise and that they were all aware of it. Although defendant's testimony and his girlfriend's police statement differed about whether defendant was aware that his companions were stealing merchandise, absent exceptional circumstances, issues of witness credibility are for the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). We will not interfere with the role of the trier of fact of determining the weight of the evidence or witness credibility. *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003). We therefore conclude that dual convictions for conspiracy to commit first-degree retail fraud and first-degree retail fraud do not

violate double jeopardy and, viewing the evidence in a light most favorable to the prosecutor, any rational trier of fact could have found that the essential elements of first-degree retail fraud were proven beyond a reasonable doubt. *Randolph, supra* at 572.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Hilda R. Gage